

Internal Revenue Service  
**memorandum**

CC:TL

Br4:JTChalhoub

date: June 27, 1986

to: District Counsel, Los Angeles CC:LA  
Attn: Paul H. Weisman

from: Director, Tax Litigation Division CC:TL

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subject: Assessment Waivers; Computation of Time; Rev. Rul. 66-17

This is in reply to your request for technical advice, dated April 11, 1986.

ISSUE

When the Service receives a statutory notice waiver, Form 870 or equivalent, for purposes of computing the 60-day period to terminate suspension of the statute of limitations under I.R.C. § 6503(a)(1) and Rev. Rul. 66-17, 1966-1 C.B. 272, is the first day of that 60-day period the day of receipt of the waiver or the following day. 6503.02-01.

CONCLUSION

Although this conclusion is not entirely free from doubt, the prevailing rule in computing statutes of limitation appears to follow Rule 6(a) of the Federal Rules of Civil Procedure which states, in relevant part, as follows:

In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of the court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. [Emphasis supplied.]

Accordingly, unless the specific statute of limitations provides the method of computation, which I.R.C. § 6501 does not, the courts would probably hold that the period begins on the day following the date of the receipt of the Form 870 in the appropriate office of the Service. This is the method set out in the Internal Revenue Manual and, by example, in Treas. Reg. § 301.6503(a)-1(a)(2).

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### DISCUSSION

Revenue Ruling 66-17, 1966-1 C.B. 272 states that a valid waiver which is filed within the 90-day period of suspension, has the effect of terminating the running of the 90-day period and starting the running of the 60-day period on the date the waiver is filed. You indicate that within the district director's staff there is a disagreement over which method to use in computing the expiration date for the period within which to make an assessment.

You cited the Internal Revenue Manual at Exhibit (12)(12)00-5 as authority to use the so-called "Julian date" method of computing the expiration of the period of limitations. The case of United States v. James J. Rae, 59-1 U.S.T.C. ¶ 9311 (D. Mass. 1959), cited in Rev. Rul. 66-17, supra, could be read as supporting the position that a so-called "calendar date" method should be used to compute the expiration of the period of limitations. Under the "Julian date" method, the date of receipt of the statutory notice waiver would be excluded from the computation. On the other hand, under the "calendar date" method, the date of receipt of such a waiver would be the first day of the 60-day period to compute the statute date. The authority of the Rae case is tenuous, at best; neither Rev. Rul. 66-17 nor Rae specifically held that for computing the statute date, the 60-day period begins on the date a statutory notice waiver is received. It is merely inferred from the language used in the ruling.

Rule 6(a) of the Federal Rules of Civil Procedure provides, in relevant part, as follows:

In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of the court, or by any applicable statute the day of the act, event, or default from which the designated period of time begins to run shall not be included.

Rule 25(a) of the Tax Court's Rules of Practice and Procedure is derived from Rule 6(a) and similarly provides, in relevant part, as follows:

In computing any period of time prescribed or allowed by these Rules or by direction of the Court or by any applicable statute which does not provide otherwise, the day of the act, event, or default from which a designated period of time begins to run shall not be included.

The commentators generally agree that FRCP 6(a) is a procedural and not a substantive rule. However, it is frequently used in computing expiration dates for statutes which create a cause of action. Most often, the question is whether a suit was timely filed under some statute giving the plaintiff a right to sue. One commentator says FRCP 6(a) should not be applied to a statute of limitations which preceded in time the adoption of the Federal Rules. In no event can FRCP 6(a) by its own force extend a statute of limitations. However, in computing the time where a statute of limitations does not provide for computation, the courts may look to the Federal Rule by analogy. Another practice is for the courts to treat the statute being applied as other than a statute of limitations. Vol. 2 J. Moore's Federal Practice ¶ 6.06[2] (2d ed. 1981).

There is some dispute in the circuits as to whether FRCP 6(a) applies directly to federal statutes of limitations or whether a similar rule may be invoked by analogy. In computing the one-year limitations period of the Truth in Lending Act, the day of the transaction is excluded and the last day of the period is included. Lawson v. Conyers Chrysler Plymouth, Etc., 600 F.2d 465 (5th Cir. 1979). Also, see In Re Gotham Provision Co., Inc., 669 F.2d 1000, 1014 (5th Cir. 1982) cert. den. 459 U.S. 858 (1982) (Rule 6(a) applicable to time calculations under federal statutes); Kollios v. United States, 512 F.2d, 1316 (1st Cir. 1975) (The modern doctrine for the computation of a six-month period is to exclude the initial or trigger day and include the last day of the period). It has been said that the Kollios rule may be too generous by one day, on a theory that the Federal Rules of Civil Procedure are not applicable to statutory time periods. McDuffee v. United States, 769 F.2d 492 (8th Cir. 1985).

Tax Court Rule 25(a) is substantially the same as FRCP 6(a). Accordingly, it is appropriate to examine the Internal Revenue Code, the Treasury Regulations and any cases thereunder to see what is said with respect to computation of time periods. The specific question you asked involves I.R.C. § 6503(a)(1) and computation of the sixty-day period after receiving a statutory notice waiver.

Treasury Regulation Section 301.6503(a)-1(a)(1) repeats the general provision of the statute, adds a rule concerning Saturdays, Sundays and legal holidays, and adds the word "additional" as a modifier to the statutory provision "for 60 days thereafter." Treas. Reg. § 301.6503(a)-1(a)(2) gives an example on how to compute the last day on which an assessment can be made. Although the example does not involve termination by a statutory notice waiver, the method of computation in the example provides specific insight into how Congress would have intended the 60-day period to be computed. The terminating or triggering event that begins the 60-day period in the example is

the date on which the decision of the Tax Court becomes final. The terminating event that begins the 60-day period in Rev. Rul. 66-17, supra, is the date of receipt of the statutory notice waiver. In the example in the regulations, the last date to make an assessment is January 5, 1979, the 60th day after November 6, 1978, the date the decision of the Tax Court became final. Thus, the regulations seem to follow FRCP 6(a) and Tax Ct. R. 25(a) on the method of computing time.

In Brown v. United States, 391 F.2d 653 (Ct.Cl. 1968), the question was what date did the 3-year statute of limitations on assessment expire. Because of the Saturday, Sunday & Holiday rule of I.R.C. § 7503, a taxpayer's return for 1955 was timely filed on April 16, 1956. The Court of Claims said the question is whether the 3-year statute of limitations on assessment against the plaintiff runs from April 15, 1956, (a Sunday) or April 16, 1956, (the actual date received). The Court of Claims held that a notice of deficiency, mailed April 16, 1959, was timely. Therefore, computation of the 3-year time period requires exclusion of the date of the event which begins the running of the period. Accord., Rev. Rul. 81-269, 1981-2 C.B. 243.

In Douglas Family Trust v. Commissioner, T.C.M. 1984-629, Judge Cohen discussed the timeliness of a notice of liability to a transferee. The Court held the limitation period against a transferee did not begin to run until the last day an assessment could be made against the transferor. On April 15, 1977, a notice of deficiency was timely sent to the transferor for the tax years 1973 and 1974. On July 11, 1977, the transferor timely petitioned the Tax Court and caused an I.R.C. § 6503(a)(1) suspension of the limitations period against the transferor until the decision of the Tax Court became final plus sixty days. The transferor's decision was entered by the Court on March 7, 1980, but was timely appealed to the Sixth Circuit. Since the appeal was filed without a bond, an assessment was made on July 1, 1980, against the transferor. The transferee was issued a notice of transferee liability on July 27, 1982, which was more than two years after an assessment was made. The transferor's appeal was denied and the judgment of the Sixth Circuit (from which no appeal was taken) was filed on September 14, 1981. According to Judge Cohen, that decision became final on the 90th day after entry, December 13, 1981, and the last day to assess the transferor would have been February 11, 1982, the 60th day after December 13, 1981. Consequently, the notice of transferee liability, dated July 27, 1982, was within the one-year period of limitations and the liability was not time barred. Under this approach, the date of the event is excluded and the 60-day period begins the day after the date of the event.

In affirming the district court on a computation of time under an "actual days" method pursuant to I.R.C. § 6502(a), the Seventh Circuit refused to allow the Commissioner to argue that its "month-days" method of computing the statute of limitations, which allegedly represented long established administrative practice, should be used on appeal when not raised in the district court. United States v. Tyrell, 329 F.2d 341 (7th Cir. 1964). Because the issue was not jurisdictional, the Circuit Court would not allow a legal argument not previously presented to the district court. The lower court at 63-2 U.S.T.C. ¶ 9595 held that suit must be filed no later than 5 years and 365 days after assessment. Under this approach, the date of the event was not excluded and suit filed on the sixth anniversary of the assessment was time barred.

In United States v. Besase, 319 F. Supp. 1064 (N.D. Ohio 1970), it was determined the Government had complied with the six-year statute of limitations in an action to enforce tax liens where the assessment date was April 17, 1964, and the date suit was filed was April 17, 1970. Looking to FRCP 6(a), the district court held the date of the event which triggered the statute of limitations is excluded from the computation of time. Even the Seventh Circuit, which authored the Tyrell opinion in 1964, has apparently backed away from its earlier strict position. In First Chicago Corp. v. Commissioner, 742 F.2d 1102 (7th Cir. 1984), the Seventh Circuit cited Badarracco v. Commissioner, 464 U.S. 386 (1984) for the proposition that statutes of limitation barring collection of taxes must be strictly construed in favor of the Commissioner.

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